Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	**CC Docket No. 97-90**
	CCB/CPD 97-12
PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION ON INTERCONNECTION COST SURCHARGES	

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Public Notice, DA 97-469 (released March 4, 1997), hereby submits the following comments in support of the "Petition for Declaratory Ruling and Contingent Petition for Preemption" ("Petition") filed by Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C. (collectively, "Petitioners") in the captioned matter on February 20, 1997.

[1] A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or will soon be, offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("ILEC") or competitive local exchange carrier ("LEC") retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

In their Petition, Petitioners urge the Commission to issue a declaratory ruling confirming that the costs incurred by ILECs in complying with the requirements of Section 251 of the Communications Act of 1934 ("Communications Act"),[2] as amended by Section 101 of the Telecommunications Act of 1996 ("1996 Act"),[3] are not recoverable through surcharges assessed on CLECs and that any State action sanctioning such charges would be subject to preemption pursuant to Section 253 of the Communications Act.[4] As reported by Petitioners, U S WEST has sought authority in each of the fourteen states comprising its service territory to impose Interconnection Cost Adjustment Mechanism ("ICAM") surcharges on CLECs.[5] As described by U S WEST, the ICAM surcharges would recover "extraordinary, one-time or start-up network rearrangement costs . . . which are not recovered by charges to CLECs in negotiated or arbitrated agreements" and which are associated with "network rearrangements mandated by the Telecommunications Act of 1996 for the convenience and use by USWC's competitors, and to facilitate USWC's existing customers' ability to choose a different local exchange service provider."[6]

TRA agrees with Petitioners that the U S WEST ICAM surcharges conflict directly with the local competition provisions of the 1996 Act, and if allowed to become effective would

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[2] 47 U.S.C. § 251.

[3] Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

[4] 47 U.S.C. § 253.

[5] Petition at 3.

[6] Application of U S WEST Communications, Inc. for the Interconnection Cost Adjustment Mechanism (Petition for Declaratory Ruling and Request for Agency Action), filed with the Utah Public Service Commission in Docket No. 97-049 on Jan. 3, 1997.

constitute an impermissible barrier to entry. TRA, accordingly, urges the Commission to grant the relief sought by Petitioners.

As the Commission has recognized, one of the principal goals of the telephony provisions of the 1996 Act is "opening the local exchange and exchange access market to competitive entry."[7] The Commission has further recognized that "the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies."[8] Accordingly, the Commission, consistent with Congressional directives, targeted for removal "significant economic impediments," as well as "existing operational barriers," to "efficient entry into the monopolized local market."[9] With respect to the former, the Commission noted that "[a]n incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by . . . insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers."[10]

Congress anticipated, and endeavored to thwart, this anticompetitive stratagem by not only imposing on ILECs the duty to provide for physical interconnection of CLEC networks, unbundled access to network elements and resale of all retail services, but by prescribing

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[7] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 3 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996) (*partial stay in effect*), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order").

[8] Id. at ¶ 10.

[9] Id. at ¶¶ 11, 16.

[10] Id. at ¶ 10.

"interconnection and network element charges" and "wholesale prices for telecommunications services."[11] By statute, charges for interconnection and unbundled network elements must be cost-based, increased only by a "reasonable profit."[12] While arguments can be made that the "costs" upon which these charges must be based should be "forward-looking long-run incremental costs" or "embedded costs," it is beyond dispute that the Section 252(d)(1) charges are the only charges that may be assessed for network interconnection and unbundled network elements. Likewise, wholesale prices must be set at levels reflective of the "marketing, billing, collection, and other costs that will be avoided by the [ILEC]" in providing wholesale, rather than resale, services.[13] And while one can argue whether wholesale prices should be computed using "actually avoided" or "reasonably avoidable" costs, it is clear that the resultant wholesale price is the only price that may be assessed for services provided at wholesale.

If Congress had intended for ILECs to have the ability to impose additional charges on CLECs seeking network interconnection, access to unbundled network elements or wholesale service offerings, it would have provided for such a charge somewhere in the telephony provisions of the 1996 Act. Thus, Congress sanctioned the imposition on CLECs and other telecommunications carriers of charges to recover "[t]he cost of establishing telecommunications numbering administration arrangements and number portability."[14] Likewise, Congress required CLECs and other telecommunications carriers to contribute to the universal

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[11] 47 U.S.C. § 252(d).

[12] 47 U.S.C. § 252(d)(1).

[13] 47 U.S.C. § 252(d)(3).

[14] 47 U.S.C. § 251(e)(2).

service support fund.[15] But Congress did not provide for a charge to recover "extraordinary, one-time or start-up network rearrangement" costs.

Absent such a Congressional directive, U S WEST's ICAM surcharges constitute the very "supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers" that the Congress and the Commission feared that the ILECs would seek to impose as a means of forestalling competitive entry. As such, these surcharges represent the very type of economic barrier to entry the Commission recognized must be removed if local exchange and exchange access markets are to be opened to competitive entry. Even U S WEST would not be so bold as to argue that substantial (and ongoing) "entry fees" would not constitute a barrier to entry, particularly for the small and mid-sized carriers that comprise the rank and file of TRA's membership. As the Commission has recognized, "smaller carriers that seek to provide competitive local service . . . are likely to have less of a financial cushion than larger antedates."[16]

Essentially, U S WEST is seeking to recover from CLECs the costs associated with upgrading its local service networks. Thus, U S WEST lists among its "network rearrangement costs," the costs associated with "additional interoffice transport facilities and . . . additional capacity at the tandem," as well as "software changes to allow for service assurance, capacity provisioning, billing and service delivery to CLECs . . . [and] the establishment of

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[15] 47 U.S.C. § 254(d).

[16] Local Competition First Report and Order, FCC 96-325 at ¶ 59.

service centers to process CLEC service orders."[17] In other words, U S WEST seeks to fund the expansion of network capacity and the introduction of wholesale capability in each of its local exchange systems.

The Commission has consistently held that the costs associated with general network upgrades should be borne by all users of the network and not selectively allocated. Thus, in determining how the costs associated with the deployment of "800" number portability should be recovered, the Commission concluded that:

> CCS7 represents a new network infrastructure that will not only support a number of new interstate and state services, but will also increase the efficiency which LECs provide existing services, basic and non-basic. As such, CCS7 represents a general network upgrade, the core costs of which should be borne by all network users. . . . . The costs of CCS7 components that will be used to support other services should be apportioned in accordance with existing rules for other network services.[18]

Similarly, in determining how to recover costs associated with the deployment of local number portability, the Commission reaffirmed that amounts expended in upgrading networks should be recovered generally from all users:

> We tentatively conclude that carrier-specific costs not directly related to number portability should be borne by individual carriers as network upgrades. . . . While some incumbent LECs may have to upgrade existing networks and infrastructure, new entrants will need to design their networks from the outset to include these capabilities . . . We note that his approach is also consistent with

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[17] Petition of American Communications Services, Inc. and American Communications Services of Pima County, Inc. for Arbitration with U S WEST Communications, Inc. of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (U S WEST Communications's Motion to Server Cost Issues and Establish Additional Cost Recovery Proceeding), filed with the Arizona Corporation Commission in Docket No. U-3021-96-448 on Jan. 6, 1997.

[18] Provision of Access for 800 Service, 4 FCC Rcd. 2824, ¶ 70 (1989), *recon.* 6 FCC Rcd. 5421 (1991), *further recon.* 8 FCC Rcd. 1038 (1993) (footnotes omitted).

> that taken in implementing 800 number portability, where LECs recovered the core costs of deploying SS7 capabilities as network upgrades from all end users."[19]

And again in the context of allocating costs associated with the introduction of dialing parity, the Commission ruled that "LECs may not recover from other carriers under a dialing parity cost recovery mechanism any network upgrade costs not related to the provision of dialing parity."[20]

The Commission should -- indeed, must -- follow the some approach with respect to the network upgrades U S WEST proposes to implement in order to accommodate the competitive provision of local exchange/exchange access service. Certainly, the increased transport and tandem capacity, as well as the enhanced provisioning, billing and service delivery, U S WEST intends to install "will be used to support other services," "increase the efficiency with which LECs provide existing services," and "facilitate the ability of incumbent carriers to compete with the offerings of new entrants."[21] As such these costs are not properly recoverable from individual competitors; they must be recovered through rates generally.

U S WEST, however, complains that it may not be able to recover the costs of network upgrades through its general rates and that "[f]ailure to provide a recovery mechanism for these extraordinary, non-recurring expenditures would constitute a taking of USWC's property without due process of law contrary to the fifth and fourteenth amendments to the United States

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[19] Telephone Number Portability (Further Notice of Proposed Rulemaking), 11 FCC Rcd 8352, ¶¶ 226 - 28 (1996).

[20] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-333, ¶ 94 (released August 8, 1996), *pet. for rev. pending sub nom.* Bell Atlantic Telephone Companies, et al. v. FCC, Case No. 96-1333 (D.C. Cir. Sept. 16, 1996), *recon. pending* ("Second Local Competition Report and Order").

[21] Provision of Access for 800 Service, 4 FCC Rcd. 2824 at ¶ 70; Telephone Number Portability 11 FCC Rcd 8352 at ¶ 227.

Constitution."[22] U S WEST is not being denied the right to recover amounts expended in upgrading its network; it is precluded only from recovering those costs in a manner designed to impede competitive entry into the local exchange/exchange access market. Thus, U S WEST can raise rates generally, but it cannot target CLECs as the source of cost recovery and impose charges which will render the competitive provision of service far more difficult. As the Commission has correctly noted, a regulated entity is no denied due process if it is provided a reasonable opportunity to recover a return on its investment within the overall regulatory framework."[23]

TRA submits that for its small and mid-sized resale carrier members, the U S WEST ICAMs would present a formidable entry barrier. As listed by Petitioners, *monthly charges* in one State range from $9,000 for resale to $35,000 for unbundled network elements to $144,000 for interconnection.[24] For smaller providers that have "less of a financial cushion," such amounts are substantial, particularly when aggregated across multiple markets and multiple states. Small to mid-sized carriers should not have to expend their limited resources to fund the upgrading of U S WEST's network facilities; these resources are far better dedicated to the provision of competitive offerings to the consuming public. The Commission adopted national rules in part to "reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996

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[22] Application of U S WEST Communications, Inc. for the Interconnection Cost Adjustment Mechanism (Petition for Declaratory Ruling and Request for Agency Action), filed with the Utah Public Service Commission in Docket No. 97-049 at 11.

[23] Local Competition First Report and Order, FCC 96-325 at ¶ 737.

[24] Petition at 3.

Act."[25] It should not permit U S WEST to negate this laudable action by simply shifting the expenditure from the State Commission hearing room to the U S WEST accounting office.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant Petitioners' Petition for Declaratory Ruling and Contingent Petition for Preemption and issue a declaratory ruling confirming that the costs incurred by ILECs in complying with the requirements of Section 251 of the Communications Act are not recoverable through surcharges assessed on CLECs and that any State action sanctioning such charges would be subject to preemption pursuant to Section 253 of the Communications Act.

Respectfully submitted,

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[25] Local Competition First Report and Order, FCC 96-325 at ¶ 61.

CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing document were mailed this 3rd day of April, 1997, by United States First Class mail, postage prepaid, to the following:

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